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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

WILLIAM JAMES STAJOS d/b/a AMERICAN EAGLE FIREWORKS, INC.

Petitioner,

v.

CITY OF LANSING and PEOPLE OF THE STATE OF MICHIGAN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

I. Can the State of Michigan's fireworks statute, MCL 750243a, establish a scheme for the classification, design, labeling and marking of consumer fireworks which is not substantially the same, contradicts, and interferes with the counterpart Federal statute, 49 U.S.C. §5125(b)? Or is the State statute preempted under Federal law?

II. Is the Michigan fireworks statute, MCL 750.243a, unconstitutionally vague as lacking sufficient notice, arbitrary, and capricious when the State statute classifies fireworks differently than the federal and nationally accepted classification scheme, when the State statute uses ambiguous terms such as "of like construction" to prohibit the possession of certain types of fireworks, and when the statute contradicts itself as to whether State or Federal classification schemes control?

PARTIES

There is no parent or subsidiary company to be listed under Rule 29.1.

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OPINIONS BELOW

The Michigan Court of Appeals issued a puplished opinion in this case on January 24, 1997. *Stajos (American Eagle) v. City of Lansing*, 221 Mich. App. 223, 561 N.W.2d 116 (1997). (*Stajos*, App. *infra*, A-2). The Michigan Court of Appeals denied rehearing on June 10, 1997. (Court of Appeals Case No. 178767). On August 28, 1998, the Michigan Supreme Court denied the Stajos application for leave to appeal. (Michigan Supreme Court Case No. 109912). Finally, On October 26, 1998, the Michigan Supreme Court denied the Stajos motion for reconsideration. (Michigan Supreme Court Case No. 109912)(App. *infra*, A-1).

STATEMENT OF BASIS FOR JURISDICTION

The Petitioner seeks to invoke the jurisdiction of the Court by seeking a Writ of Certiorari from the judgement of the Michigan Supreme Court, denying reconsideration on October 26, 1998, of federal and constitutional questions, when the Michigan State statute in question, MCL 750.243a, is preempted by Federal Law and when the State statute is repugnant to the United States Constitution. Jurisdiction is conferred upon the Court to review the judgement and order in question by Writ of Certiorari pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

MCL 750.243a
MCL 750.243b
MCL 750.243c
49 C.F.R. section 173.50
49 C.F.R. section 173.51
49 C.F.R. section 173.52
49 C.F.R. section 173.53
49 C.F.R. section 173.54
49 C.F.R. section 173.56
49 U.S.C. section 5125

STATEMENT OF THE CASE

On June 17, 1993, police officers of the City of Lansing entered American Eagle Fireworks, Inc. ("American Eagle"), the business establishment of Plaintiff William J. Stajos ("Stajos"). The officers executed a warrant authorizing the seizure of any and all fireworks "which either moved or report when ignited." Without further guidance, the officers seized all the items which they believed to be illegal under the warrant. Shortly thereafter, the officers destroyed the fireworks without order from the court.

On June 28, 1993, Stajos filed a complaint seeking injunctive relief and a declaratory judgment. (Ingham County Circuit Court Case No. 93-75000-CZ, Hon. William E. Collette). Stajos alleged that he was entitled to an injunction to prevent the threat of further seizures, given the impending July 4th fireworks season, and that he was entitled to declaratory relief regarding the interpretation of the statute. The complaint further asserted that there are a number of well-defined and recognized categories of United States Department of Transportation ("DOT") common fireworks that are neither specifically restricted nor specifically allowed by MCL 750.243a. (App. *infra*, A-14). Stajos alleged that a proper reading of this statute allowed the unrestricted sale of the following kinds of fireworks: helicopter type rockets, mines and shells, ground spinners, wheels, illuminating torches, and new and novel items not specifically classified, but approved by DOT as class C common fireworks. Stajos alternatively argued that MCL 750.243a was preempted by federal regulations or, as a criminal statute, was void for vagueness as it related to the five specifically enumerate categories of federal class C common fireworks. (complaint).

On June 28, 1993, the circuit court issued a temporary restraining order allowing Stajos to sell all fireworks not specifically prohibited for use without a permit pursuant to

subsection (2) of the statute. The court stated that the statute needed to be amended to clarify what fireworks may be lawfully sold. (show cause hearing, ruling on TRO). Shortly thereafter, the court permitted the People of the State of Michigan to intervene as a party defendant because Stajos was asking the court to construe a penal statute, and because any ruling could affect pending criminal district court cases against Stajos and others for selling illegal fireworks.

The court held an evidentiary hearing on April 18, 1994, at which time Stajos produced two expert witnesses who explained the different kinds of fireworks and how they work. Dr. Roger Schneider, a chemistry professor, nationally recognized combustible materials consultant, and an advisor to the American Pyrotechnic Association (APA), testified that APA Standard 87-1 has been adopted by the DOT through 49 C.F.R. §173.56 and by the Consumer Products Safety Commission ("CPSC") at 16 C.F.R. §1507 as the standard for the classification and description of consumer fireworks. Dr. Schneider further testified that the Michigan fireworks statute was extremely ambiguous and that whoever wrote the statute did not understand the fireworks business. (evidentiary hearing, Schneider testimony). He testified that the entire statute is "fraught with ambiguity and nonsense." *(Stajos*, App. *infra*, A-3). Insomuch as the Lansing enforcement officials relied on definitions and advisories from the Michigan State Police (MSP), the court specifically invited the City and the Ingham County Prosecutor to produce a witness from the MSP. (show cause hearing, June 28, 1993). The Defendants declined to do so. Thus, the technical and evidentiary record supports Stajos's position and is unrebutted. Nevertheless, the court thereafter dissolved the temporary restraining order, stating as follows: "The statute, as written, is clear and unambiguous on its face and has been for the past sixty (60) years." The court also rejected plaintiff's preemption argument. (evidentiary hearing, ruling from bench). The court later denied plaintiff's motion for reconsideration.

Stajos appealed as of right, and the challenged opinion was rendered on January 24, 1997. *Stajos (American Eagle) v. City of Lansing*, 221 Mich. App. 223, 561 N.W.2d 116 (1997). (*Stajos*, App. *infra*, A-2). The court denied the preemption claim, reasoning that the federal regulations cited by plaintiff only address the packaging and classification of fireworks for interstate shipment and do not address the sale of fireworks within a state. Further, the court found that 18 U.S.C. §836 indicates that the definitions of fireworks contained in the laws of the respective states shall be applied. (*Stajos*, App. *infra*, A-11). The court also denied the vagueness claim, holding that the permitted fireworks are readily discernable from a cursory reading of subsection (3). (*Stajos*, App. *infra*, A-13).

Rehearing was denied by the Michigan Court of Appeals on June 10, 1997. Thereafter, Stajos filed an application for leave to appeal to the Michigan Supreme Court, in which Stajos raised both the preemption and vagueness arguments. On August 28, 1998, the Michigan Supreme Court denied the Stajos application for leave to appeal. The order stated in full:

> On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented would be reviewed by this Court.

Stajos filed a motion for reconsideration with the Michigan Supreme Court, and again raised both the preemption and vagueness issues. On October 26, 1998, the court denied the Stajos motion, "because it does not appear that the order was entered erroneously." (App. *infra*, A-1).

ARGUMENT

I. THE CLASSIFICATION SCHEME IN THE MICHIGAN FIREWORKS STATUTE, MCL 750.243a, IS INVALID AS NOT "SUBSTANTIVELY THE SAME" AS THE PREEMPTIVE FEDERAL REGULATIONS, 49 USC 5125(b), BECAUSE MCL 750.243a-d CONTAINS DESCRIPTIONS, CLASSIFICATIONS AND RESTRICTIONS INCONSISTENT WITH FEDERAL REGULATIONS.

a. The Fireworks Classification Scheme in the Michigan Fireworks Statute, MCL 750.243a, Contradicts and Interferes with the Federal Regulatory Classification of Fireworks.

The United States Department of Transportation ("DOT") had regulated both special display Class B and consumer Class C fireworks. Following the 1976 Bicentennial, and widespread concern regarding the safety of fireworks, the United States Consumer Products Safety Commission ("CPSC") was given partial jurisdiction over Class C consumer fireworks. Thus, the interlocking federal regulatory scheme now has the DOT regulating the transportation of both special display Class B (now Div. 1.3) and consumer Class C fireworks (now Div. 1.4), while the CPSC regulates all other aspects of Class C fireworks, including classification and packaging. The CPSC does not regulate Class B special display fireworks, because they are not considered to be consumer products. By contrast, the United States Bureau of Alcohol, Tobacco and Firearms ("BATF") has jurisdiction for licensing the manufacturers and dealers of Class B special display fireworks (now Div. 1.3). The BATF has no jurisdiction over the Class B consumer

fireworks involved in this case.

On January 1, 1991, the CPSC promulgated more detailed and preemptive regulations for the construction, classification, definition, packaging, labeling and transportation of consumer fireworks. The UPSC and the DOT abandoned the old Class B and Class C categories, and instead, adopted the United Nations international explosive classification scheme. Under 49 C.F.R. §173.53, Class B special display fireworks are now classified as Division 1.3 fireworks ("Div. 1.3"), and Class C consumer fireworks are classified as Division 1.4 fireworks ("Div. 1.4"). (App. *infra*, A-25-26). Div. 1.3 display and Div. 1.4 consumer fireworks are defined in 49 C.F.R. §173.50(b), as follows:

> (3) Division 1.3 consists of explosives that have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard.
>
> (4) Division 1.4 consists of explosives that present a minor explosive hazard. The explosive effects are largely confined to the package and no projection or fragments of appreciable size or range is to be expected. An external fire must not cause virtually instantaneous explosion of almost the entire contents of the package. (App. *infra*, A-24).

More specifically, the American Pyrotechnics Association, Inc. ("APA") has established the standard for construction and approval of fireworks, novelties and theatrical pyrotechnics, in APA Standard 87-1 (April, 1993 ed.)(Appellant's brief on appeal to Michigan Court of Appeals, Exhibit A). The APA Standard 87-1 describes the contents of a particular type of fireworks, how it works, and sets limits on the explosive contents. More importantly, APA Standard 87-1 classifies individual fireworks devices as either Div. 1.3 display fireworks or Div. 1.4 consumer fireworks. The definitions

established in APA Standard 87-1 is accepted and in compliance with both the DOT and the CPSC regulations. 49 C.F.R. §§173.50-53, and 49 C.F.R. §173.56. (App. *infra*, A-24-27).

The APA Standard 87-1 classifies the following fireworks devices as Div. 1.4 consumer fireworks: firecrackers, roman candles, missile-type rockets, sky rockets, bottle rockets, wheels, cylindrical and cone fountains, mines and shells, sparklers, and party poppers. In the present case, it is undisputed that the fireworks were all classified and labeled, under federal regulations, as Div. 1.4 consumer fireworks.

However, by contrast, the Michigan fireworks statute establishes its own classification scheme that is in conflict with the federal classification scheme. Indeed, the antiquated Michigan statute, MCL, 750.243a, incorrectly classifies both Div. 1.3 and Div. 1.4 fireworks, merges the two divisions, and thoroughly obscures a proper and consistent interpretation of the law. (App. *infra*, A-14-16). Under MCL 750.243a(1), the definition section, mutant "Michigan Class B" and "Michigan Class C" classes of fireworks are created:

> (b) "Class B fireworks" means toy torpedoes, railway torpedoes, firecrackers or salutes that do not qualify as class C fireworks, exhibition display pieces, aeroplane flares, illuminating projectiles, incendiary projectiles, incendiary grenades, smoke projectiles or bombs containing expelling charges but without bursting charges, flash powders in inner units not exceeding 2 ounces each, flash sheets in interior packages, flash powder or spreader cartridges containing not more than 72 grains of flash powder each, and other similar devices.
>
> (c) "Class C fireworks" means toy smoke devices, toy caps containing not more than .25 gains of explosive mixture, toy

propellant devices, cigarette loads, trick matches, trick noise makers, smoke candies, smoke pots, smoke grenades, smoke signals, hand signal devices, Very signal cartridges, sparklers, explosive auto alarms, and other similar devices. (App. *infra*, A-14).

MCL 750.243a(1) conforms to neither the federal regulatory scheme, the APA Standards, or other Michigan statute sections, including the rest of MCL 750.243a.

Next, the second subsection of the statute, MCL 750.243a(2)(a-d), establishes the prohibitory part of the statute:

> (2) **Sale, Possession, transportation, use, prohibited**. Except as provided in subsection (3) and sections 243b, 243c, and 243d, a person, firm, partnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, posses, give, furnish, transport, use, explode, or cause to explode any of the following:
>
> * * *
>
> (c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle rockets, whistling chasers, rockets on sticks, or other fireworks of like construction.
>
> (d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, exalates, sulphide of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives. (App. *infra*, A-14-15).

This subsection, MCL 750.243 a(2), prohibits fireworks by name, chemical content, and description. The description of fireworks in subsection a(2) is different than the descriptions

offered in Subsection a(1). Subsection a(2) makes no reference to the definitions of fireworks established in subsection a(1), the federal regulations, or the APA standards. Nevertheless, Michigan courts, prosecutors and police officers repeatedly and erroneously use the definitions of the so-called "Michigan Class B" and "Michigan Class C" fireworks, and assume that those classifications apply to the list of specifically restricted fireworks in MCL 750.243a(2)(c) and (d). Thus, federal consumer fireworks devices (Div. 1.4), such as roman candles, missile-type rockets, sky rockets, bottle rockets, wheels, cylindrical and cone fountains, and mines and shells are identified by Michigan authorities as "Michigan Class B" fireworks and then erroneously assumed to be the equivalent of the more dangerous old federal DOT Class B (Div. 1.3 special display fireworks). Those assumptions are in error and every year cause mass confusion in the transportation, possession, and sale of fireworks in Michigan.

Next, as the counterpart of prohibitory subsection a(2), subsection MCL 750.243a(3) creates a group of exceptions to the prohibitions. (App. *infra*, A-15-16). MCL 750.243a(3)(a-f) lists numerous devices as exceptions to the definitions and restrictions in the first two subsections of the statute. Yet, many of the devices listed and exempted in subsection a(3)(a-f) are not fireworks devices under the federal classification system. Then, MCL 750.243a(3)(g), the out of state sales exception, refers and specifically adopts the federal DOT regulations. Thus, part a (3)(g) conflicts with the definition of "Michigan Class A and Class B" fireworks established in MCL 750.243a(1) because any fireworks shipped under part (g) must be classified and treated pursuant to the DOT regulations.

Similarly, MCL 750.243c, MCL 750.243d, and MCL 480.11 all conflict with the definitions of " Michigan Class B" and "Michigan Class C" in MCL 750.243a(1). MCL 750.243c, requires that all intrastate transportation of "fireworks" be in "accordance" with DOT regulations. (App. *infra*, A-19). MCL

750.243d(b) requires that fireworks be stored at a distance from inhabited buildings, railways and highways, which is established under DOT regulations. Likewise, MCL 480.11 *et seq.*, the Michigan Motor Carrier Safety Act, adopts the federal regulations for the definition, classification, description, and packaging of Div 1.4 explosives (old DOT Class C). Thus, this statute conflict with the "Michigan Class C and Class B" fireworks defined in MCL 750.243a(1).

Finally, the federal regulations and APA Standard 87-1 include the following consumer devices which are nowhere enumerated in the Michigan statute: mines and shells, illuminating torches, wheels, ground spinners, aerial spinners, other devices producing unique effects, combination items producing one or more of the effects enumerated, and any new, old, different or unique items submitted for classification pursuant to 49 C.F.R. §173.56(b).

b. The List of Forbidden Chemicals and Compounds in MCL 750.243a(2)(d) is Not Substantively the Same and is in Conflict with the List of Forbidden Chemicals Found in the Federal Regulations.

49 C.F.R. §173.54 (forbidden explosives)((App. *infra*, A-26), specifically sets forth the types of compounds which are not ordinarily acceptable in any explosives, including some explosive types of fireworks. 49 C.F.R. §173.56 sets forth the procedures for identifying, defining and classifying new explosive devices. Thus, MCL 750.243a(2)(d) is preempted insofar as it purports to prohibit different chemicals and compounds.

The enumeration of prohibited chemicals in the Michigan statute is set forth in MCL 750.243a(2)(d). The

preemptive federal regulations are found at APA 87-1, Table 3.6-1, the forbidden explosive prohibitions of the DOT (49 C.F.R. §173.54) and the prohibited chemicals under the CPSC (16 C.F.R. §1507.2). A comparison of the federal regulations indicates that the following chemicals and compounds are proscribed by the Michigan statute, but not by the federal regulations: nitrates, fulminates, oxalate, sulfides of lead, barium, antimony, the exceptions to the use of chlorates under the federal regulations, 16 C.F.R. §1507.2(c), and the exceptions to the use of phosphorous (16 C.F.R. §1507.2(g)). Thus, the Michigan statute is at fatal variance with the applicable federal regulations in this area also.

c. The Fireworks Listed in MCL 750.243a Contain Numerous Devices which are not Regulated as Fireworks or have Different Requirements than the Preemptive Federal System.

MCL 750.243a(1)(b) refers to the following devices as "Michigan Class B," even though they are no longer considered to be fireworks and/or have no meaning within the APA or federal classification system: railway torpedoes, aeroplane flares, smoke projectiles or bombs containing expelling charges but without bursting charges, flash powder or spreader charges containing not more than 72 grains. Similarly, MCL 750.243(a)(1)(c) defines as "Michigan Class C" fireworks the following items which are not considered to be fireworks under the federal system: toy smoke devices, toy propellant devices, smoke candies, smoke pots, smoke grenades, smoke signals, hand signal devices, and very signal cartridges.

Next, the prohibition subsection of the Michigan statute, MCL 750.243a(2), prohibits a number of devices which are not consumer fireworks or not fireworks at all under the federal

scheme: blank cartridges, blank cartridge pistols, toy cannons, toy canes or toy guns in which explosives are used, and unmoored and unmanned balloon requiring fire.

Further, the following items are listed under MCL 750.243a(3) as exceptions to the prohibitions in the first two subsections of the paragraph, but are not fireworks items under the federal system: signal flares, blank cartridges, and emergency signals.

Even descriptions of the Michigan unrestricted fireworks (so-called "Michigan Class C") in MCL 750.243a(3)(a-e), differ in their construction and labeling requirements from the federal regulations and APA Standard 87-1. MCL 750.243a(3) allows:

a. Toy pistols, etc., no longer regulated as fireworks in the federal system;

b. Sparklers are limited to .0125 pounds burning portion, whereas the federal regulations allow up to 100 grams burning portion and set forth contents and wire standards. APA 87-1;

c. Limits flitter sparklers to paper tubes not exceeding 1/8 inch in diameter. The federal regulation has no such provision. APA 87-1; and

d. Allows toy snakes not containing mercury in cardboard boxes with no more than 12 per box and specifically labeled. Insofar as this is a fireworks item, federal regulations do not require these packaging, content and labeling restrictions. APA 87-1 (glow worm).

It is obvious that the Michigan fireworks statute does not comprehend modern consumer fireworks and the comprehensive federal and international classification system which covers them. The statute requires a tortured reading of its various categories and descriptions, along with the use of

vague terminology ("other similar devices", "other fireworks of like construction", "other modern explosives"). The merchant is at the mercy of any constable's interpretation. The Defendants and other law enforcement officials in Michigan are preventing merchants from selling federally approved consumer fireworks not restricted for use in Michigan pursuant to MCL 750.243a(2)(c), resulting in repeated prosecution and the confiscation of commercial stock. That is the precise reason that the federal classification scheme is mandatorily preemptive.

d. The Michigan Fireworks Statute, MCL 750.243a, is Preempted by Federal Regulations Pursuant to 49 USC 5125(b).

The preemptive effect of the regulations under the Hazardous Materials Transportation Uniform Safety Act (HMTA) of 1990 was strengthened in 1992, by adding two new subsections to 49 U.S.C. §5125 (App. *infra*, A-20), to preempt any requirement of a state, political subdivision or Indian tribe if the non-federal requirement is not "substantively the same" as any provision of the HMTA or any federal regulation issued under the HMTA at 49 C.F.R. §107.202(a), regarding: 1) the designation, description and classification of hazardous materials; and 2) the packing, repacking, handling, labeling, marking and placarding of hazardous materials.

"Substantively the same" is defined at 49 C.F.R. §107.202(d) as: "Conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." Increased safety through uniformity motivated Congress to preempt these areas, even in intrastate commerce:

> Congress agreed that these subject areas should be Federally preempted. The HMTUSA

amended section 105 of the HMTA to explicitly extend the Secretary's jurisdiction to cover all intrastate commerce. 57 Fed. Reg. 20425 (1993).

Consistent with that congressional mandate, it is the position of the DOT Research and Special Programs Administration (RSPA) that, as regards the five covered areas:

> National uniformity is critical. Therefore, in those areas, the Department of Transportation has determined what requirements are necessary for the safe transportation of hazardous materials. Any additional requirements, in excess of the Federal requirements, would not be "substantively the same," and would be preempted. 57 Fed. Reg. 20425-26.

It would be difficult to find a clearer statement of preemption. Insofar as the Michigan statute defines and regulates consumer fireworks differently than federal regulations, or includes items that are not fireworks devices under the federal regulations, it is preempted on its face.

Against the above background of conflicting state and federal fireworks classification, *Schneidewind v. ANR Pipeline Co*, 485 U.S. 293, 299-300 (1988), is controlling because of the specific expression of congressional intent. In the case at bar, the preemption is explicit. 49 U.S.C. §1804(a)(4)(A) provides:

> Except as provided in subsection (b) of this section and unless otherwise authorized by Federal law, any law, regulation, order, ruling, provision or other requirement of a State or political subdivision thereof or an Indian tribe, which concerns a subject listed in subparagraph (B) and which is not substantively the same as any provision of this Act or any regulation under such provision which concerns such subject, is preempted.

Such "covered subjects" include "[t]he designation, description, and classification of hazardous materials." 49 USC 1804(a)(4)(13)(1). For purposes of these "covered subjects," it does not matter that the state classification scheme can be administered without damaging the ability of the federal government to classify. The key term is "concerning." This term is defined as "[t]o pertain to, relate, or belong to; be of interest or importance to; have connection with; . . ." BLACK'S LAW DICTIONARY 289 (6th ed. 1990). The Supreme Court has determined that when the term "relating to" is utilized, any state law which "has a connection with or reference to" the subject matter is "relating to" it. *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992).

Here, the object in question is the classification and description of fireworks. It matters not that the state seeks to classify in order to create criminal offenses. Preemption analysis turns not on whether federal and state laws "are aimed at distinct and different evils," but whether they "operate upon the same object". *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 105-06 (1992) (quoting and interpreting *Napier v. Atlantic Coast Line R Co*, 272 U.S. 605, 612 (1926) (other citations omitted). "[P]art of the preempted field is defined by reference to the purpose of the state law in question, another part of the field is defined by the state law's actual effect." *Gade*, 505 U.S. at 105. Thus, the fact that the federal laws are concerned with uniformity and safety and state law is concerned with safety and defining criminal offenses provides, rather than negates, the basis for preemption.

It is beyond dispute that the state law's effect is to result in a classification system which is not substantively the same as the federal scheme. The necessitated "high degree of uniformity of Federal, State, and local laws is required in order to promote safety and to encourage the free flow of commerce" with regard to materials regulated by the Act. *Colorado Public Utilities Comm v. Harmon*, 951 F.2d 1571, 1580 (10th Cir.

1991)(quoting H.R.Rep. No. 444 (Part 1), 101st Cong., 2d Sess, at 22 (1990). This uniformity is "critical" in areas such as classification. *Harmon*, 951 F.2d at 1580-81 (quoting 136 Cong.Rec. H13645-03 (remarks of Rep. Hammerschmidt)).

The uniformity of classification is necessitated due to the fact that classification systems which vary by region or state create too great of risk as to confusion. *Southern Pacific Transportation v. Public Service Comm of Nevada*, 909 F.2d 352, 358 (9th Cir. 1990); *Harmon*, 951 F.2d at 1582-83. Such confusion tends to interrupt the free flow of commerce in Michigan and in other jurisdictions. *Id.* At present, the interruption of commerce into, within, and out of Michigan is demonstrated by the repeated and inconsistent prosecution of Plaintiffs and other fireworks dealers.

With regard to "covered areas," including classification, Congress, required any state laws to be "substantially similar" to the federal laws. Congress has clearly shown its willingness to designate "covered areas" to have preclusive effect, regardless of conflict, in areas other than hazardous materials. Occupational Safety and Health Act, 29 U.S.C. §667 (1982); Securities and Exchange Act of 1934, 15 U.S.C. §78bb(a) (1988): Employee Retirement Income Security Act, 29 U.S.C. §144(l) (1982).

Similarly, in *Jones v Rath Packing Co*, 430 U.S. 519 (1977), the Court found that Congress' express intent to prohibit the imposition of "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those" under federal legislation required preemption, even if the state laws supplemented, rather than conflicted, with the federal legislation.

The rationale for such limits on state power is aptly stated in *Rice v Santa Fe Elevator Corp*, 331 U.S. 218, 234 (1947):

> Congress did more than make the Federal Act paramount over state law in the event of conflict. It remedied the difficulties which had been encountered in the Act's administration by terminating the dual system of regulation.

When there is such a statement of preemptive intent, it is unnecessary to analyze whether "there is an actual conflict between federal and state law . . . or whether compliance with both federal and state standards would be physically impossible." *City of New York v. FCC*, 486 U.S. 57, 65-66 (1988). This is because Congress and/or administrative bodies, pursuant to enabling legislation, have made the subject its "exclusive domain". *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984). This is the case with federal fireworks classification, designation, description, labeling and marking. If such classifications are not adhered to uniformly, the confusion will have a negative impact on the safety as well as disrupting interstate commerce.

In *Stajos (American Eagle) v. City of Lansing*, 221 Mich. App. 223, 561 N.W.2d 116 (1997), the opinion appealed from herein, the state courts have avoided the preemption issue by finding that:

> [t]here is no preemption because the federal regulations cited by plaintiff only address the packaging and classification of fireworks for interstate shipment and do not address the sale or use of fireworks within a state. Cf. *Colorado Pyrotechnic Ass'n v Meyer*, 740 F Supp 792 (D Colo, 1990).

The court found, without evidence or analysis, that the separate Michigan scheme has no effect on the federal purpose. That finding is erroneous for several reasons. First, 49 C.F.R. §173.53 specifically addresses the question of "state or local laws, ordinances or regulations not pertaining to the

transportation of hazardous material" in changing over to the new international classification scheme:

> Where the classification system in effect prior to January 1, 1991, is referenced in state or local laws, ordinances or regulations not pertaining to the transportation of hazardous material, the following table may be used to compare old and new hazard class names: [Division 1.4 equals Class C explosives]. 49 C.F.R. §173.53. (App. *infra*, A-25-26).

Thus, 49 C.F.R. §173.53 clearly refutes any claim that the federal regulations are preemptive only when applied to interstate transportation issues. Indeed, §173.50 et seq., deals exclusively with the definitions, classification and packaging for Class 1 explosives, without any reference to transportation. (App. *infra*, A-25-26).

Second, the classification scheme under MCL 750.243a(l) is internally in conflict with the specific provisions of MCL 750.243a(3)(g) as it relates to interstate transportation, and MCL 750.243c, relating to intrastate transportation, both of which specifically adopt the DOT regulations. Therefore, it creates two classification schemes within the same statute.

Third, the Michigan Hazardous Substances Act, MCL 286.463, *et seq.*, and the Michigan Motor Carrier Safety Act, MCL 480.15(a), specifically adopt the federal regulations for the definition, classification, description and packaging of Div. 1.4 explosives. Thus, the consumer fireworks classification scheme under MCL 750.243a(l)(c) is not only preempted by the federal regulations and in conflict with other provisions of the same statute, it is in conflict with the provisions of at least two other state statutes.

Further, the *Stajos* court's reliance on *Colorado Pyrotechnic Association v. Meyer*, is misplaced for the several

reasons. The case concerned the question of out of state sales, comparable to MCL 750.243a(3)(g), rather than the question of the classification scheme. The case involved only the question of the likelihood of success on the merits for the purpose of a preliminary injunction, rather than a final ruling. Finally, *Colorado Pyrotechnic* preceded the new and more stringent federal preemptive regulations as it relates to fireworks put into effect on May 13, 1992 and thus turned on the question of whether or not the local law was "inconsistent" under the Hazardous Materials Transportation Act of 1974, as opposed to the "substantively the same" standard set forth under the HTUMSA set forth in the authorities cited above.

The disruptive effect on commerce by the classification scheme in MCL 750.243a(l) is that the same consumer fireworks device is subject to a different classification every time it is moved into, out of, or around Michigan, if it is a restricted item under MCL 750.243a(2)(c), [fireworks, rockets, roman candies and whistling chasers] or any other device "of like construction" claimed by the local fire marshal to be prohibited. Please consider the following sequence. First, these devices are federal consumer (Div. 1.4) fireworks (minor hazard) while being shipped into Michigan, pursuant to MCL 286.463, *et seq.*, and MCL 480.11, *et seq.*, as well as 49 U.S.C. §5125. When they come to rest in Michigan and are put into storage by a wholesaler licensed under MCL 750.243b, they suddenly become "Michigan Class B" fireworks pursuant to MCL 750.243a(l)(b) and MCL 750.243a(2)(c), and must be treated as dangerous explosives. Then, when they are moved from the wholesaler to a retailer in intrastate commerce, they again become federal Div. 1.4 consumer (minor hazard) fireworks pursuant to the transportation provision of MCL 750.243c. Finally, when they come to rest at the retailers, they again become "Michigan Class B" and are subjected to the special dangerous explosive storage requirements of MCL 750.243d.

It is impossible for the interstate or intrastate shipper to know what devices will be considered "Michigan Class B" and therefore be subjected to different requirements than all other consumer fireworks. The above scenario is the reason that national uniformity is demanded by the mandatory preemption of 49 U.S.C. §5125.

e. The Federal Penal Statute, 18 U.S.C. §836, does not Permit or Encourage Local Classification Schemes.

The Michigan Court of Appeals found that 18 U.S.C. §836 can be relied on to allow a state classification scheme for fireworks which is not substantively the same as the preemptive federal regulatory scheme. 18 U.S.C. §836 states:

> Whoever, otherwise than in the course of continuous interstate transportation through any State, transports fireworks into any State, or delivers them for transportation into any State, or attempts to do so, knowing that such fireworks are to be delivered, possessed, store, transhipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined under this title or imprisoned not more than one year, or both.
>
> This section shall not apply to a common carrier or contract carrier or to international or domestic water carriers engaged in interstate commerce or to the transportation of fireworks into a State for the use of Federal agencies in the carrying out or the furtherance of their operations.

> In the enforcement of this section, the definitions of fireworks contained in the laws of the respective States shall be applied.

The *Stajos* court stated:

> Further, 18 USC 836 imposes criminal penalties on a person who knowingly transports fireworks 'in a manner or for a use prohibited by the laws of such state specifically prohibiting or regulating the use of fireworks.' This provision also indicates that the definitions of fireworks contained in the laws of the respective states shall be applied. It is thus apparent that the federal regulations contemplate that states are not preempted from regulating the intrastate sale and use of fireworks.

That contention is erroneous for several reasons. First, Stajos does not argue that states cannot regulate the sale and use of fireworks, only that they may not erect a separate and different classification, design and labeling scheme.

Second, 18 U.S.C. §836 is not concerned at all with the definition and classification of hazardous materials and makes no mention of classes. Consequently, it only forbids the intentional transportation of fireworks into a state with the knowledge that they are to be used in violation of a valid state regulatory scheme, regardless of class. Since the Michigan regulatory scheme is invalid because of the preemption of classification pursuant to 49 U.S.C. §5125, the criminal statute, 18 U.S.C. §836, does not apply.

Third, 18 U.S.C. §836 went into effect on July 1, 1954. There are few reported cases relating to the statute, none of them relating to classification. By contrast, the amendments in the federal HMTUSA went into effect on May 13, 1992.

Consequently, the antiquated Church Act (18 U.S.C. §836) cannot be said to in any way control or effect classification preemption under federal law.

Fourth, the Church Act only prohibits the intentional interstate importation of fireworks into a state with a valid regulatory scheme with the knowledge that they will be used (not sold, transported or stored) in violation of that state's valid regulatory scheme. Because Michigan allows the possession, sale and use of all fireworks under MCL 750.243a(3)(g) (interstate sales) and MCL 750.243b (permits), it is impossible for a commercial dealer to transport fireworks into the State of Michigan with the knowledge that they will be "used" in violation of the Michigan statute. There are no *per se* illegal fireworks under Michigan law. Thus, reliance on 18 U.S.C. §836 to justify a separate classification scheme is misplaced.

Another point of authority frequently raised to justify conflicting local regulations is *Cohen v. Bredehoeft*, 290 F.Supp. 101 (D.C. Tex.); 402 F.2d 61 (1968), which upheld a total prohibition ordinance in Houston, Texas. However, *Cohen* is irrelevant to the instant case. It did not address classification. Michigan can ban fireworks, but cannot create a separate classification scheme. Regardless, *Cohen* was decided in 1968. It predated the specific congressional intent now found in 49 U.S.C. §5125, effective May 13, 1992. Thus, the element lacking in *Cohen* of a clearly manifested congressional intent to displace local laws is now fulfilled, particularly as it relates to classification.

f. The Improper Classification Scheme Invalidates the Entire Michigan Statute.

The final question is whether the Michigan classification scheme is so pervasive and is so conflicting with the federal regulatory scheme that every part of the state statute is affected

by those defects.

Obviously, MCL 750.243a(l)-(3) are invalid because subsection (1) is the nonconforming classification scheme itself; subsection (2) contains prohibitions which do not refer to class and are, therefore, incomprehensible; subsection (3) contains allowable exceptions which not only do not refer to class, but also contain specifications and devices which are different than the federal regulations or devices not contained within the federal regulations. Thus, section "a" is invalid.

Next, MCL 750.243b (permits) is invalid as it relates to consumer fireworks because it contains no reference to class under either state or federal regulations, but refers back to the prohibition section of MCL, 750.243a(2), which itself contains no reference to the class of the regulated devices, refers to non-fireworks devices and neglects large number of recognized consumer devices. Thus, section "b" is invalid.

MCL 750.243c (intrastate transportation) properly adopts the federal regulations, but conflicts with MCL 750.243a(l), which establishes a separate classification scheme under the state statute.

In summary, every section of MCL 750.243a-d is affected by the classifications and definitions found in MCL 750.243a(l). It is therefore entirely invalid.

II. THE MICHIGAN FIREWORKS STATUTE, MCL 750.243a, IS VOID FOR VAGUENESS ON ITS FACE AND AS APPLIED.

The Michigan fireworks statute, MCL 750.243a, is unconstitutionally vague as a penal statute under the Due Process Clause of the Fourteenth Amendment inasmuch as it uses regulatory language and descriptions which the citizen, constable, and court cannot sufficiently interpret to know what is or is not a violation of the law. The result is arbitrary and discriminatory enforcement of the law. Three major vagueness problems exist within the statute. First, the Michigan fireworks classification scheme directly contradicts the federal fireworks regulatory scheme. Second, in defining and prohibiting certain types of fireworks, the Michigan statute uses the terms "and other similar devices," "or other fireworks of like construction," and "or other modern explosives." These vague phrases are used to define and prohibit types of consumer Div. 1.4 fireworks that are not otherwise defined or prohibited by the statute. Third, the three separate subsections of the statute are themselves contradictory, and, as admitted by the *Stajos* court, an interpretation or reliance on one subsection necessarily leaves another subsection surplusage.

The rule of law surrounding the issue of a statute being void for vagueness is well established. The law is unconstitutionally vague if the ordinary person cannot reasonably know what action a statute prohibits. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Additionally, to be constitutional, the law must be properly defined so as to prevent erratic and capricious enforcement by the police, prosecutor, and courts. *Id.* The rule was eloquently expressed by Justice Marshall in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1971):

> It is a basic principle of due process that an enactment is void for vagueness if its

> prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may-trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (footnotes omitted)

Stajos submits that the vague language of the operative sections of the Michigan statute, MCL 750.243a, fail to give them and their customers "fair notice" of the prohibited conduct and has encouraged erratic and arbitrary law enforcement. (App. *infra*, A-14). The vagueness of the statute arises from three separate errors in the construction of the statute.

First, as discussed, the Michigan statute has established its own classification scheme, "Michigan Class B and C" fireworks, which is directly at odds with the mandatorily preemptive federal classification scheme. *See supra* part I.a. MCL 750.243a(1)(b) defines firecrackers and other similar devices as Class B fireworks. Then, MCL 750.243a(1)(c) defines smoke devices, toy caps, cigarette loads and other innocuous devices, which are not labeled as fireworks under federal regulations, as Class C fireworks. In contrast, the DOT and CPSC defines firecrackers, roman candles, and rockets as Div.1.4 consumer fireworks. Prior to 1991, under federal

regulations, firecrackers, roman candles, bottle rockets and other like consumer fireworks were classified as DOT Class C consumer fireworks. Special display fireworks are now labeled as Div. 1.3 fireworks, and prior to 1991, were labeled DOT Class B fireworks. 49 C.F.R. §173.50. (App. *infra*, A-24). The result of the contradictory Michigan Class B and C classification scheme is that many people in Michigan, including police officers, prosecutors and judges, mistakenly believe that consumer fireworks, such as firecrackers, roman candles, and rockets, are the more dangerous Div. 1.3 (old DOT Class B) special display fireworks.

The second major problem with the Michigan fireworks statute is the vague phrases used in the definition and prohibition subsections of the statute. MCL 750.243a(l)(b) includes in its definition of "Class B fireworks" the phrase "and other similar devices." (App. *infra*, A-14). Similarly, the definition of "Class C fireworks" under subsection a(l)(c) also includes the phrase "and other similar devices." Then, the prohibition subsection of the statute, MCL 750.243a(2)(c), explicitly prohibits "[f]irecrackers, torpedoes, skyrockets, . . . rockets on sticks, or other fireworks of like construction." Finally, the list of prohibited chemicals under subsection a(2)(d) lists the prohibited chemicals and ends with the phrase "or a compound containing these or other modern explosives."

The use of these ambiguous phrases to define and prohibit fireworks renders the Michigan statute void for vagueness on its face. Indeed, the *Stajos* court stated in a footnote that "[f]or purposes of clarity, the Legislature may wish to consider rewriting the statute." Nevertheless, the *Stajos* court conducted a convoluted analysis of the statute and concluded that "[a]s stated by the prosecutor in its brief on appeal, 'Although the fireworks statute is not a model of clarity, it passes constitutional muster.'"

The Michigan State Police ("MSP") also find that the

statute is not a model of clarity. The MSP uses the phrase "of like construction," in the prohibitory subsection MCL 750.243a(2)(d), to prohibit fireworks not otherwise prohibited. The MSP annually misinforms local police and fire enforcement officials that the "rule of thumb" is that fireworks which "move, give off an audible report or go into the air" are prohibited for use in Michigan. (Bulletin 22, Revised January, 1994)(Appellant's brief in support of application for leave to appeal, Exhibit 2). First, the MSP is not given authority under the statute to define prohibitive fireworks. Second, the prohibitory description of "anything that moves, gives off an audible report, or moves into the air" has been an invitation to mischief and arbitrary enforcement because it is applicable in some measure to all consumer fireworks devices, not just those specifically prohibited by the statute. In fact, this "rule of thumb" applies to fireworks specifically allowed by statute such as cones and fountains, which shoot a shower of sparks upward for varying distances. MCL 750.243a(3)(d). (App. *infra*, A-15). In actuality, items of like construction to "sky rockets, bottle rockets, whistling chasers, rockets on sticks" are devices which are driven by their own power away from the point of launch and stabilized either by a stick or fins. The mere "going into the air" indicates nothing about similarity of construction and does not address the dangers which led the legislature to restrict their use.

Similarly, "firecrackers, torpedoes, [and] . . . daygo bombs . . ." are ostensibly the source of the claimed prohibition of devices that make "an audible report." According to this standard, almost all consumer fireworks should be restricted, because most of them make an "audible" report. Trick noise makers, caps, pistols and cannons, which all make an audible noise, are all allowed by the statute for unrestricted use. MCL 750.243a(3)(b). It is the perceived function or effect which has wrongly been used to determine the prohibition, not likeness of construction.

Mines and shells are not restricted fireworks under the Michigan statute, but they are prohibited under the MSP "rule of thumb" because they are erroneously perceived to be "of like construction" to bottle rockets and sky rockets. In fact, according to the unrebutted expert testimony given by Dr. Roger Schneider in the trial court, mines and shells are projectiles which go a limited distance straight into the air and then either burn or emit a shower of sparks (like a fountain). (evidentiary hearing, April 18, 1994, Schneider testimony). They are not items "of like construction" to rockets or missiles inasmuch as they are not self-propelled and are not guided by fins, sticks or tails. Further, they do not have a similar effect to missiles or rockets in that they go only a short distance into the air and do not travel away from the point of launch. Thus, the expansion of the phrase "of like construction" to mean "like effect" represents an impermissible judicial enlargement of a criminal statute. Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

The third major problem with the Michigan fireworks statute is that the three separate subsections of the statute are themselves contradictory and reliance on one subsection necessarily leaves another subsection surplusage. As stated by the court of appeals below:

> The prosecution argues that plaintiff's proposed reading of the statute that a person may sell, possess, and use all fireworks except the items mentioned in subsection (2)(c) is erroneous because it renders subsection (3)(a)-(f) nugatory. The prosecution nevertheless concedes that this case presents the unfortunate situation where a part of the fireworks statute will become surplusage regardless of which party's interpretation this Court ultimately adopts, i.e., the prosecution admits that its suggested interpretation that the phrase 'fireworks containing an explosive or inflammable

compound' forbids all fireworks such that the remainder of subsection (2)(d) and all of (2)(c) become surplusage. The prosecutor nevertheless contends that its interpretation does far less violence to the statute than the interpretation offered by plaintiff. (*Stajos*, App. *infra*, A-7-8)(emphasis added).

In fact, Stajos merely argued for a strict construction of the statute, prohibiting only the specifically enumerated items. Obviously, the phrase "containing an explosive or inflammable compound" not only includes all fireworks, but also includes most every day commercial items. Everything is "inflammable" under the appropriate conditions. To solve this problem, the *Stajos* court engaged in a very expansive interpretation of the statute:

> Also, just because the items prohibited in subsection (2)(c) such as firecrackers would also be prohibited by subsection (2)(d) because they contain an explosive or inflammable compound, does not necessarily make subsection (2)(c) nugatory. Rather, we consider the language used to have been the Legislature's way of providing a list of specific well-known fireworks it wanted prohibited and then adding subsection (2)(d) to catch any other non-excepted fireworks using very expansive and overlapping language. Our interpretation of the statute merely requires one to imply in the phrase 'any and other' at the end of subsection (2)(c) and before subsection (2)(d). Doing this produces a result that is consistent with the overall language of the statute and effects the object of the statute. (*Stajos*, App. *infra*, A-8)(emphasis added).
>
> * * *
>
> Therefore, it is not necessary to determine exactly what 'other similar devices,' 'other

> fireworks of like construction,' or 'other modern explosive" mean to know what fireworks are prohibited for sale without a permit. Indeed, the other fireworks of like construction' and 'other modern explosives' phrases effect only a partial ban on those fireworks not excepted elsewhere in the statute. These phrases are swallowed up by subsection (2)(d) which refers to 'fireworks containing an explosive or inflammable compound' and ban the use, sale or possession of all fireworks not permitted elsewhere in the statute. (*Stajos*, App. *infra*, A-12)(emphasis added).

The statute cannot be saved by this tortured interpretation. Reduced to its essence, this interpretation of the statute makes the specific listing of devices pursuant to MCL 750.243a(2)(a)-(c) nonsensical surplusage, as well as turning the real purpose of subsection (d), a specific listing of prohibited chemical compounds, into one of a general prohibition. Further, the prohibition against ambiguity and vagueness in a penal statute is not a matter of legislative intent, but rather one of constitutional right, *Bell v. United States*, 349 U.S. 81, 83 (1955), which the court below ignored.

Additionally, in finding that the vague phrases used in the statute did not rise to the level of unconstitutional vagueness, the opinion in *Stajos* violated universal standards of statutory construction by presuming to determine a legislative intent of total prohibition where that intent is nowhere expressed in the statute, and by presuming that the unrestricted items allowed pursuant to MCL 750.243a(3), are exceptions to a total prohibition on fireworks arising out of the combined effect of MCL 750.243a(2)(c) and (d). In doing so, the court ignored the express language of the seminal 1929 Michigan fireworks statute, which was codified by MCL 750.11, *et seq.*, in 1931. Section 1 of PA 14 of 1929 specifically stated that:

> Nothing in this Act shall be construed to prohibit . . . such fireworks as are not herein prohibited . . . or the sale of any fireworks provided the same were to be shipped directly out of state.

Consequently, the *Stajos* court not only improperly undertook to provide legislative intent, but also ignored the express intent of the legislature at the time of codification. The Michigan fireworks statute is unconstitutionally vague and can only be saved by strictly construing its prohibition to those specifically enumerated and by reference to the preemptive federal classification scheme.

Respectfully submitted.

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Dated: January 24, 1999

APPENDIX TO PETITION FOR CERTIORARI

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ORDER

STATE OF MICHIGAN
IN THE SUPREME COURT

Entered: October 26, 1998

WILLIAM JAMES STAJOS d/b/a
AMERICAN EAGLE FIREWORKS, INC.,

Plaintiff-Appellant,

v.

SC: 109912
COA: 178767
LC: 93-75000-CZ

CITY OF LANSING,

Defendant-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,

Intervening Defendant-Appellee,.

On order of the Court, the motion for reconsideration of this Court's order of August 28, 1998 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Taylor, J., not participating.

OPINION

STATE OF MICHIGAN
IN THE COURT OF APPEALS

(Decided and Filed January 24, 1997)

WILLIAM JAMES STAJOS d/b/a
AMERICAN EAGLE FIREWORKS, INC.,

Plaintiff-Appellant,

v. No. 178767

CITY OF LANSING,

Defendant-Appellee,

and

PEOPLE OF THE STATE OF MICHIGAN,

Intervening Defendant-Appellee.

Before: CORRIGAN, P.J. and TAYLOR and D.A. JOHNSTON*,JJ.
TAYLOR, J.

Plaintiff appeals as of right from an order denying him the relief he sought in this declaratory judgment action. We affirm.

On June 17, 1993, police officers entered one of plaintiff's Lansing business locations and seized certain fireworks pursuant to a search warrant. Six days later, plaintiff filed a complaint seeking injunctive relief and a declaratory judgment. He alleged that he was entitled to an injunction to prevent the threat of further seizures, given the impending July 4th fireworks season. The complaint further asserted that the case arose from the fact that there are a number of well-defined and recognized categories of United States Department of Transportation (USDOT) common fireworks that are neither

specifically restricted nor specifically allowed by MCL 750.243a; MSA 28.440(1). It was his position that a proper reading of this statute allowed the unrestricted sale of the following kinds of fireworks: helicopter type rockets, mines and shells, ground spinners, wheels, illuminating torches, and new and novel items not specifically classified, but approved by USDOT as class C common fireworks. Plaintiff alternatively argued that MCL 750.243a; MSA 28.441(1) was preempted by federal regulations or, as a criminal statute, was void for vagueness as it related to the five specifically enumerate categories of federal class C common fireworks.

The trial court ordered the City of Lansing to show cause why a preliminary injunction should not issue. At the show cause hearing, plaintiff explained that the heart of the lawsuit was to obtain a ruling regarding the legality of selling those fireworks that are not specifically forbidden or specifically allowed by MCL 750.243a: MSA 28.440(1). At the conclusion of the show cause hearing, the court indicated that the statute needed to be amended to clarify what fireworks may be lawfully sold and issued a temporary restraining order allowing plaintiff to sell all fireworks not specifically prohibited for use without a permit pursuant to subsection (2) of the statute. Thereafter, the court permitted the people of the State of Michigan to intervene as a party defendant because plaintiff was asking the court to construe a penal statute and because any ruling could affect pending criminal district court cases against plaintiff for selling illegal fireworks. The court subsequently held an evidentiary hearing at which two experts testified for the plaintiff explaining various kinds of fireworks and how they work. Dr. Roger Schneider, a chemistry professor and combustible materials consultant, testified that the statute was extremely ambiguous and stated that whoever wrote the statute did not understand the fireworks business. He testified that the entire statute is "fraught with ambiguity and nonsense." The court thereafter dissolved the temporary restraining order, stating as follows: "The statute, as written, is clear and unambiguous on its face and has been for the past sixty (60) years." The court also rejected plaintiff's preemption argument. The court later denied plaintiff's motion for reconsideration.

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*Circuit judge, sitting on the Court of Appeals by assignment.

I

We review de novo a trial court's ruling on questions of law in a declaratory judgment action. *LASA V Lansing Bd of Education*, 216 Mich App 79, 84; 549 NW2d 15 (1996). Where the language of a statute is clear and unambiguous, the intent of the Legislature must be effected according to its plain meaning. *Victorson v Dep't of Treasury*, 439 Mich 131, 137-138; 482 NW2d 685 (1992). Where, as here, the language is not plain, but is subject to varying interpretations, we look to the purpose of the act to ascertain legislative intent. *Longstreth v Gensel*, 423 Mich 675, 680; 377 NW2d 804 (1985).

The relevant portion of MCL 750.243a: MSA 28.440(1) provides as follows:

> (2) Except as provided in subsection (3) and sections 243b, 243c and 243d, a person, firm, partnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, [1] explode or cause to explode any of the following:
>
> (a) A blank cartridge, blank cartridge pistol, toy cannon, toy cane, or toy gun in which explosives are used. [cf. (3)(b)].
>
> (b) An unmanned balloon which requires fire underneath to propel it and is not moored to the ground while aloft.
>
> (c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs,[2] bottle rockets,

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[1]Thus, the Legislature had made it a criminal misdemeanor for individuals to light a firecracker in Michigan without a permit.

[2]Dr. Schneider testified that "daygo bombs" are now known as aerial bombs.

whistling chasers, rockets on sticks or other fireworks of like construction.[3]

(d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, sulphides [sic] of lead, barium antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives.

(3) A permit is not required for the following:

(a) Flat paper caps containing nor more than .25 of a grain of explosive content per cap, in packages labeled to indicate the maximum explosive content per cap.

(b) Toy pistols, toy cannons, toy canes, toy trick noise makers, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contract [sic] with the cap when in place for the explosion and which are not designed to break apart or be separated so as to form a missile by the explosion. [cf.(2)(a)].

(c) Sparklers containing nor more than .0125 pounds of burning portion per sparkler.

(d) Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone fountains, and cylinder fountains.

(e) Toy snakes not containing mercury, if

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[3]Violation of these provisions is a misdemeanor offense. MCL 750.243e; MSA 28.440(5).

packed in cardboard boxes with nor more than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed on the box; and toy smoke devices.

(f) [An exception not directly relevant to this appeal.]

(g) [An exception not directly relevant to this appeal.]

There is no dispute that the statute makes it a misdemeanor to sell[4] or use without a permit (1) firecrackers, (2) torpedoes, (3) skyrockets, (4) roman candles, (5) daygo bombs, (6) bottle rockets, (7) whistling chasers, (8) rockets on sticks, (9) other fireworks of like construction, (10) fireworks containing an explosive or inflammable compound, or (110 a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, sulfides of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives.

There is also no dispute that a person may sell or use without a permit (1) certain flat paper caps, (2) certain toy pistols, toy cannons, toy canes, toy trick makers, toy guns that use paper caps, (3) certain sparklers, (4) certain flitter sparklers, (5) cone fountains, (6) cylinder fountains, (7) certain toy snakes, and (8) toy smoke devices.

Plaintiff argues that a proper interpretation of the statute would allow him lawfully to possess and sell without a permit certain fireworks that are not among the categories expressly allowed under subsection (3) or expressly forbidden by name under subsection (2), i.e., helicopter type rockets, mines and shells, ground spinners, wheels, illuminating torches, and new and novel items not specifically classified, but approved by USDOT as class C common fireworks. We disagree.

Plaintiff argues that MCL 750.243a; MSA 28.440(1) must be strictly construed in his favor because it is a penal statute. While

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[4]It is not a misdemeanor to sell such items for direct shipment out of state pursuant to federal regulations. Subsection (3)(g).

plaintiff is correct in characterizing the statute as penal, this does not warrant strict construction. This statute is a part of the Michigan Penal Code, MCL 750.1 *et seq.* MCL 750.2: MSA 28.192 modifies the rules of statutory construction for statutes found in the Michigan Penal Code, stating in relevant part that "[t]he rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof." Therefore, the rule of lenity that requires ambiguities in penal statutes to be resolved in favor of leniency does not apply to the interpretation of this statute. *People v Poole*, 218 Mich App 702, 713 n2; ___ NW2d ___ (1996).

Dr. Schneider testified that subsection (2)(d) is ambiguous because it is subject to two interpretations. The first interpretation would ban all fireworks that contain any combination of the anions (nitrates, fulminates, chlorates, oxalates, or sulfides of lead) with any of the other materials (barium antimony, arsenic, mercury, nitroglycerine, or phosphorous). Dr. Schneider indicated that such a statutory scheme would preclude the use of barium nitrate, which is used in all sparklers, and antimony sulfide, which is used in a variety of other fireworks. A second interpretation would ban *all* compounds involving *any* of the five anions. This wold preclude the use of brasium nitrate, antimony sulphide, and potassium nitrate. Dr. Schneider testified that potassium nitate is used to manufacture the black powder found in most fireworks, and is used in all fuses. Therefore, the second interpretation of subsection (2)(d) would prohibit any firework that had a fuse. On cross-examination, Dr. Schneider testified that a phrase of the beginning of subsection (2)(d), "Fireworks containing an explosive or inflammable compound," would necessarily encompass *all* fireworks and would be sufficient to ban every kind of firework> Dr. Schneider noted that this language renders the remaining portion of the statute (which lists various anions and metals) unnecessary. In a post-hearing affidavit filed in support of plaintiff's motion for reconsideration. Dr. Schneider stated that the statute appears to restrict some fireworks and allow those not prohibited and that, if the statute has any meaning at all, it can only be read to restrict those fireworks containing compounds incorporating both an anion and cation from the listed compounds.

The prosecution argues that plaintiff's proposed reading of the statute that a person may sell, possess, and use all fireworks except the items mentioned in subsection (2)(c) is erroneous because it renders subsection (3)(a)-(f) nugatory. The prosecution nevertheless concedes

that this case presents the unfortunate situation where a part of the fireworks statute will become surplusage regardless of which party's interpretation this Court ultimately adopts, i.e., the prosecution admits that its suggested interpretation that the phrase "fireworks containing an explosive or inflammable compound" forbids all fireworks such that the remainder of subsection (2)(d) and all of (2)(c) become surplusage. The prosecutor nevertheless contends that its interpretation does far less violence to the statute than the interpretation offered by plaintiff.

A fair review of he fireworks statute reveals a general prohibition with certain limited exceptions. The permitted fireworks do not end with words such as "or other fireworks of like construction" as does the list of fireworks that may not be sold or used without a permit. Further, subsection (2)(d) broadly forbids non-identified fireworks containing any of eleven different chemicals/metals or other modern explosives. Thus, the wording of the statute suggests that the Legislature intended the exclusions to be broadly read and the exemptions to be narrowly read. Also, just because the items prohibited in subsection (2)(c) such as firecrackers would also be prohibited by subsection (2)(d) because they contain an explosive or inflammable compound. does not necessarily make subsection (2)(c) nugatory. Rather, we consider the language used to have been the Legislature's way of providing a list of specific well-known fireworks it wanted prohibited and then adding subsection (2)(d) to catch any other non-excepted fireworks using very expansive and overlapping language. Our interpretation of the statute merely requires one to imply in the phrase "any and other" at the end of subsection (2)(c) and before subsection (2)(d). Doing this produces a result that is consistent with the overall language of the statute and effects the object of the statute. MCL 750.2; MSA 28.192. Cf. *Dean v Dep't of Corrections*, ___ Mich ___ (Docket No. 10195, issues December 10, 1996) (to effectuate the legislative intent, the phrase "a mandatory term of imprisonment" must be read to mean any minimal term of imprisonment imposed by a judge under the statute). Slip op at 13-14. Indeed, in the last two paragraphs of Dr. Schneider's post-hearing affidavit he concludes that the only reasonably scientific way to read the prohibited and excepted sections of the statute is to consider the exceptions under subsection (3) as exceptions to the prohibitions under subsection (2). While we are mindful that some other assertions of Dr. Schneider made prior to this peroration appear contradictory, we nevertheless agree with his conclusion.

We note that the history in the legislative analysis for 1978 PA 258 supports our interpretation. The Legislature had amended the fireworks statute in 1968 to provide that fireworks listed in subsection (2)(c) and (2)(d) were illegal "except as otherwise provided by law." Because of a federal court ruling which cited this language to broaden the types of fireworks allowed, the Legislature amended the statute in 1978 PA 258. That this was intended to restore the narrower definition of allowed fireworks can be seen from the House Legislative Analysis, HB 4987, June 14, 1978:

> For many years, it was widely assumed that Michigan Law prohibited the sale to the general public and use of all firecrackers other than caps, sparklers, and toy snakes. In fact, the state penal code stats that all fireworks with more than one-quarter of a grain of gunpowder are prohibited "except as otherwise provided by law", but the state's hazardous substances act refers to federal fireworks regulations as the applicable state standard -- federal regulations which permitted some exploding fireworks with up to two grains of gunpowder. In 1976, a federal judge ruled that because of the reference to federal regulation in the hazardous substance act, the sale and use of fireworks with up to two grains of gunpowder are not subject to criminal prosecution in Michigan.

This analysis went on to describe what the bill would accomplish:

> The bill would delete the phrase ["]except as otherwise provided by law" which was interpreted by a federal judge to mean that federal regulations more permissive than the state penal code provisions about fireworks would govern prosecution involving the sale and use of fireworks in Michigan, thus returning the state to the standard in effect prior to the ruling. It would also add to the list of prohibited fireworks those which contain fulminates.

The arguments for and against 1978 PA 258, as presented in this analysis also indicated an awareness that the amendments would

ban the general sale and use of all fireworks not elsewhere excepted:

> Michigan law is intended to prohibit the general sale and use of all fireworks with over one-quarter grain of gunpowder. . . . In combination with House Bill 6316, the bill would return the state to the restrictive standard which existed before a court decision exposed an inadvertent loophole in the state law.
>
> * * *
>
> Representatives of the pyrotechnical amusement industry have contended that a return to a ban on all Class C fireworks except sparklers, snakes and caps is unwarranted because many of the fireworks in this broad category are harmless.

Thus, the history precipitating the 1978 amendment, which animated the Legislature, leads us to construe section (2) as forbidding all fireworks not permitted by an exception>

Because helicopter type rockets, mines and shells, ground spinners wheels, illuminating torches, and new and novel items not specifically classified, but approved by USDOT as class C common fireworks, are not permitted by section (3) and they contain "an explosive or inflammable compound," they may not be lawfully sold or used without a permit.

We also note with approval the following comment from the prosecutor's brief on appeal:
"A reasonable person could rightfully question the wisdom of a statute which bans all but the most innocuous fireworks. Any discussion regarding a statute's prudence, however is best left to the legislature rather than the courts."[5]

II

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[5]For purposes of clarity, the Legislature may wish to consider rewriting the statute.

Plaintiff also argues that MCL 750.243a: MSA 28.440(1) is preempted by various federal regulatoins. The trial court rejected this claim, finding no conflict between the federal regulations and the statute and no reason to suppose that Congress intended to preempt the states from regulating fireworks sales.

In considering plaintiff's claim, we are cognizant that Congress explicitly may define the extentto which its enactments preempt state law. *Schneidewind v ANR Pipeline Co*, 485 US 293, 302; 108 S Ct 1145, 1150; 99 L Ed 2d 316, 325 (1988). In the absence of an express Congressional comand, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the statues to supplement it. *Cipollone v Liggett Group, Inc.*, 505 US 504, 516; 112 S Ct 2608, 2617; 120 L Ed 2d 407, 423 (1992). Properly promulgated federal regulations may also preempt state statutes. *In re Freedland Estate*, 38 Mich App 592, 596; 197 NW2d 143 (1972).

The trial court properly rejected plaintiff's preemption claim. There is no preemption because the federal regulations cited by plaintiff only address the packaging and classification of fireworks for interstate shipment and do not address the sale or use of fireworks within a state. Cf. *Colorado Pyrotechnic Ass'n v Meyer*; 740 F Supp 792 (D Colo, 1990). Further, 18 USC 836 imposes criminal penalties on a person who knowingly transports fireworks "in a manner or for a use prohibited by the laws of such state specifically prohibiting or regulating the use of fireworks." This provision also indicates that the definition of fireworks contained in the laws of the respective states shall be applied. It is thus apparent that the federal regulatoins contemplate that states are not preempted from regulating the intrastate sale and use of fireworks.

III

Plaintiff also complains that the fireworks statute is unconstitutionally void for vagueness. As recently stated in *People v Lino*, 447 Mich 567, 575-576; 527 NW2d 434 (1994):

> In order to pass constitutional muster, a penal statute must define the criminal offense "with

sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case. When making a vagueness determination, a court must also take into consideratoion any judicial constructions of the statute.

> Thus, there are at least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary an discriminatory enforcement, or (3) being overbroad and impinging on irst Amendment freedoms.

Plaintiff challenges as being void for vagueness subsections (1)(b) and (c) which define "Class B fireworks" and "Class C fireworks" respectively by listing various fireworks types and ending their classification with the phrase "and other similar devices," subsection (2)(c) which lists a set of controlled fireworks by type an ends with the phrase "or other fireworks of like construction," and subsection (2)(d) which lists a set of controlled fireworks by type and ends with the phrase "or other modern explosives."

When evaluating the vagueness of a statute, this Court will "look to the entire text of the statute to determine whether the requisite certainty exists." *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984). As explained earlier in this opinion, the Legislature had made the sale, possessionk or use, without a permit, of all fireworks not expressly permitted by sectoin (3)[6] a misdemeanor. Therefore, it is not necessary to determine esactly what "other similar devices," "other fireworks of like construction," or "Other modern explosive" mean to know what fireworks are prohibited for sale without a permit. Indeed, the "other fireworks of like construction" and "other modern explosives" phrases effect only a partial ban on those fireworks not excepted elsewhere in the statute. These phrases are swalowed up by subsection (2)(d) which refers to "fireworks containing an explosive or inflammable compound" and ban the use, sale or possession of all fireworks not permitted elsewhere in the statute. Therefore, the

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[6]Sections 243b, 243c and 243d are other exceptions that are not expressly relevant to this appeal.

alleged vagueness of the subsections (2)(c) and (d) language is a moot question because the legality of fireworks sales, possession or use is determined by the "[f]ireworks containing an explosive or inflammabe compound" phrase in subsection (2)(d), regardless of an activity's disposition under the remainder of subsections (2)(c) and (d). We further note that subsection (1)(b) and (c)'s use of the phrases "other similar devices" is only utilized in determining the proper storage of fireworks. MCL 750.243d(b); MSA 28.440(4)(b).

In sum, the permitted fireworks are readily discernible from a cursory reading of subsection (3). Thus, we find that MCL 750.243a: MSA 28.440(1) provides fair notice of prohibited conduct and does not provide for arbitrary and discriminatory enforcement. As stated by the prosecution in its brief on appeal, "Although the fireworks statute is not a model of clarity, it passes constitutional muster."

Affirmed.

STATE STATUTE

750.243a. Fireworks

Sec. 243a. (1) **Definitions.** As used in this chapter:

(a) "Fireworks" means a device made from explosive or flammable compositions used primarily for the purpose of producing a visible display or audible effect, or both, by combustion, deflagration, or detonation. Fireworks includes class B fireworks and class C fireworks.

(b) "Class B fireworks" means toy torpedoes, railway torpedoes, firecrackers or salutes that do not qualify as class C fireworks, exhibition display pieces, aeroplane flares, illuminating projectiles, incendiary projectiles, incendiary grenades, smoke projectiles or bombs containing expelling charges but without bursting charges, flash powders in inner units not exceeding 2 ounces each, flash sheets in interior packages, flash powder or spreader cartridges containing not more than 72 grains of flash powder each, and other similar devices.

(c) "Class C fireworks" means toy smoke devices, toy caps containing not more than .25 grains of explosive mixture, toy propellant devices, cigarette loads, trick matches, trick noise makers, smoke candles, smoke pots, smoke grenades, smoke signals, hand signal devices, Very signal cartridges, sparklers, explosive auto alarms, and other similar devices.

(2) **Sale, possession, transportation, use, prohibited.** Except as provided in subsection (3) and sections 243b, 243c, and 243d, a person, firm, partnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, explode, or cause to explode any of the following:

(a) A blank cartridge, blank cartridge pistol, toy cannon, toy cane, or toy gun in which explosives are used.

(b) An unmanned balloon which requires fire underneath to propel it and is not moored to the ground while aloft.

(c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle rockets, whistling chasers, rockets on sticks, or other fireworks of like construction.

(d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives.

(3) **Exceptions.** A permit is not required for the following:

(a) Flat paper caps containing not more than .25 of a grain of explosive content per cap, in packages labeled to indicate the maximum explosive content per cap.

(b) Toy pistols, toy cannons, toy canes, toy trick noise makers, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contract with the cap when in place for the explosion and which are not designed to break apart or be separated so as to form a missile by the explosion.

(c) Sparklers containing nor more than .0125 pounds of burning portion per sparkler.

(d) Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone foutains, and cylinder fountains.

(e) Toy snakes not containing mercury, if packed in cardboard boxes with not more than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed on the box; and toy smoke devices.

(f) Possession, transportation, sale, or use of signal flares of a type approved by the director of the department of state police, blank cartridges or blank cartridge pistols specifically for a show or theater, for the training or, exhibiting of dogs, for signal purposes in athletic sports, for use by military organizations, and all items described in subsection (2) used by railroads for emergency signal

purposes.

(g) The sale of fireworks, provided they are to be shipped directly out of state pursuant to regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water.

STATE STATUTE

750.243b. Permit for use or sale of fireworks; application; purpose of use; age limitation.

Sec. 243b. (1) The council or commission of a city or village or the township board of a township, upon application in writing, on forms provided by the director of the department of state police, may grant a permit for the use of fireworks otherwise prohibited by section 243a,[1] within their political jurisdiction, manufactured for outdoor pest control or agricultural purposes, or for public display by municipalities, fair associations, amusement parks, or other organizations or groups of individuals approved by the township authority, if the applicable provisions of this act are compiled with. The permits shall be on forms provided by the director of the department of state police. After a permit has been granted, sales, possession, or transportation of fireworks for the purposes described in the permit only may be made. A permit granted under this subsection shall not be transferable, nor shall a permit be issued to a person under the age of 18 years.

(2) The council or commission of a city or village or the township board of a township, upon application in writing, may grant a permit, on forms provided by the director of the department of state police, to a resident wholesale dealer or jobber to have in his possession within the political jurisdiction, fireworks otherwise prohibited by section 243a, for sale Only to holders of permits as provided in this section. A permit granted under this subsection is not transferable, nor shall a permit be issued to a person under the age of 18 years.

(3) Before a permit for a pyrotechnic display is issued, the person, form, or corporation making application therefor shall furnish proof of financial responsibility by a bond or insurance in an amount deemed necessary by the local governing authority to satisfy claims for damages to property or personal injuries arising out of an act or omission on the part of the person, firm, or corporation, or an agent or employee thereof, in the amount, character, and form the

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[1]Section 75.253a.

local authority determines necessary for the protection of the public.

(4) A permit shall not be issued under this act to a nonresident person, firm, or corporation for conduct of a pyrotechnic display in this state until the person, firm, or corporation has appointed in writing a resident member of the bar of this state or a resident agent to be his legal representative upon whom all process in an action or proceeding against him may be served.

(5) The local governing authority shall rule on the competency and qualifications of operators of pyrotechnic displays, as the operator has furnished in his application form, and on the time, place, and safety aspects of the displays before granting permits.

STATE STATUTE

750.243c. Transportation of fireworks intrastate; permit

Sec. 243c. Transportation of fireworks intrastate shall be made only with the permits provided for in this act and as follows:

(a) In accordance with United States department of transportation regulation for transportation of explosives and other dangerous articles by motor, rail, and water, including specifications for shipping containers.

(b) In nonpassenger carrying vehicles, in charge of a competent driver not less than 18 years of age, which are equipped with a 15-pound carbon dioxide or a 10 pound dry chemical fire extinguisher; and in or near which smoking shall be prohibited while loading, unloading, or transporting fireworks.

FEDERAL STATUTE

49 U.S.C. §5125 Preemption

(a) General.---Except as provided in subsections (b), (c) and (e) of this section, and unless authorized by another law of the United States, a requirement of a state, political subdivision of a state or Indian tribe is preempted if---

(1) complying with a requirement of the state, political subdivision or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the state, political subdivision or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) Substantive differences.---(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order or other requirement of a state, political subdivision of a state or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking and placarding of hazardous material.

(C) the preparation, execution and use of shipping documents related to hazardous material and requirements related to the number, contents and placement of those documents.

(D) the written notification, recording and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing or testing of a packaging or a container represented, marked, certified or sold as qualified for use in transporting hazardous material.

(2) If the Secretary of Transportation prescribes or has prescribed

under section 5103(b), 5104, 5110 or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a state, political subdivision of a state or Indian tribe may prescribe, issue, maintain and enforce only a law, regulation, standard or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not earlier than 90 days after the Secretary prescribes the regulation ro standard nor later than the last day of the 2-year period beginning on the date the secretary prescribes the regulation or standard.

(3) If a state, political subdivision of a state or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (12) of this subsection, an additional fine or penalty may not be imposed by any other authority.

(c) Compliance with section 5112(b) regulations.---(1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a state or Indian tribe may establish, maintain or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation or requirement complies with section 5112(b).

(2)(A) A highway routing designation, limitation or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C) and (F).

(B) This subsection and section 5112 of this title do not require a state or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation or requirement was established before November 16, 1990.

(C) The Secretary may allow a highway routing designation, limitation or requirement to continue in effect until a dispute related to the designation, limitation or requirement is resolved under section 5112(d) of this title.

(d) Decisions on preemption.---(a) A person (including a state, political subdivision of a state or Indian tribe) directly affected by a requirement of a state, political subdivision or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with states, political subdivisions of states, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a state, political subdivision of a state or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

(e) Waiver of preemption.---A state, political subdivision of a state or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement by the state, political subdivision or tribe acknowledges is preempted by subsection (a), (b)(1) or (c) of this section. Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement---

(1) Provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and

(2) is not an unreasonable burden on commerce.

(f) Judicial review.---A party to a proceeding under subsection (d) or (3) of this section may bring a civil action in an appropriate district court of the United States for judicial review of the decision of the Secretary not later than 60 days after the decision becomes final.

(g) Fees.---(1) A state, political subdivision of a state or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing and maintaining a capability for emergency response.

(2) A state or political subdivision there for Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on---

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee; and

(D) such other matters as the Secretary requests.

FEDERAL REGULATIONS

Subpart C -- Definitions, Classification and Packaging for Class

49 CFR Section 173.50 Class 1---definitions.

(1) Explosive. For the purpose of this subchapter, an explosive means any substance or article, including a device, which is designed to function by explosion (i.e., an extremely rapid release of gas and heat) or which, by chemical reaction within itself, is able to function in a similar manner even if not designed to function by explosion, unless the substance or article is otherwise classed under the provision of this subchapter.

(b) Explosives in Class 1 are divided into six divisions as follows:

(1) Division 1.1 consists of explosives that have a mass explosion hazard. A mass explosion is one which affects almost the entire load instantaneously.

(2) Division 1.2 consists of explosives that have a projection hazard but not a mass explosion hazard.

(3) Division 1.3 consists of explosives that have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard.

(4) Division 1.4 consists of explosives that present a minor explosion hazard. The explosive effects are largely confined to the package and no projection of fragments of appreciable size or range is to be expected. An external fire must not cause virtually instantaneous explosion of almost the entire contents of the package.

(5) Division 1.5 [footnote: The probability of transition from burning to detonation is greater when large quantities are transported in a vessel.] consists of very insensitive explosives. This division is comprised of substances which have a mss explosion hazard but are so insensitive that there is very little probability of initiation or of transition from burning to detonation under normal condition of transport.

(6) Division 1.6 [footnote: The risk from articles of Division 1.6 is lim ited to the explosion of a single article.] consists of extremely insensitive articles which do no: have a mass explosive hazard. This division is comprised of articles which contain only extremely insensitive detonating substances and which demonstrate a negligible probability of accidental initiation or propagation.

Section 173.51 Authorization to offer and transport explosives.

(a) Unless otherwise provided in this subpart, no person may offer for transportation or transport an explosive, unless it has been tested and classed and approved by the Associate Administrator for Hazardous Materials Safety (Section 173.56).

(b) Reports of explosives approved by the Department of Defense or the Department of Energy must be filed with, and receive acknowledgment in writing by, the Associate Administrator for Hazardous Materials Safety prior to such explosives being offered for transportation.

Section 173.52 Classification codes and compatibility groups of explosives.

(a) The classification code for an explosive, which is assigned by the Associate Administrator for Hazardous Materials Safety in accordance with the subpart, consists of the division number followed by the compatibility group letter. Compatibility group letters are used to specify the controls for the transportation, and storage related thereto, of explosives and to prevent an increase in hazard that might result if certain types-of explosives were stored or transported together. Transportation compatibility requirements for carriers are prescribed in Sections 174.81, 175.78, 176.83 and 177.848 of this subchapter for transportation by rail, air, vessel and public highway, respectively, and storage incidental thereto.

(b) Compatibility groups and classification codes for the various types of explosives are set forth in the following tables. Table 1 sets forth compatibility groups and classification codes for substances and articles described in the first column of
Table 1. Table 2 shows the number of classification codes that are possible within each explosive division. Altogether, there are 35 possible classification codes for explosives.

Section 173.53 Provisions for using old classifications of explosives.

Where the classification system in effect prior to January 1, 1991, is referenced in state or local laws, ordinances or regulations not pertaining to the transportation of hazardous materials, the following table may be used to compare old and new hazard class names:

Current Classification 1991	Class name prior to Jan.1,
Division 1.1	Class A explosives.
Division 1.2	Class A or Class B explosives
Division 1.3	Class B explosive
Division 1.4	Class C explosives
Division 1.5	Blasting agents
Division 1.6	No applicable hazard class

Section 173.54 Forbidden explosives.

Unless otherwise provided in this subchapter, the following explosives shall not be offered for transportation or transported:

(a) An explosive that has not been approved in accordance with Section 173.56 of this subpart.

(b) An explosive mixture or device containing a chlorate and also containing:

(1) An ammonium salt, including a substituted ammonium or quaternary ammonium salt; or

(2) An acidic substance, including a salt of a weak base and a strong acid.

(c) A leaking or damaged package of explosives.

(d) Propellants that are unstable, condemned or deteriorated.

(e) Nitroglycerin, diethylene glycol dinitrate or any other liquid explosives not specifically authorized by this subchapter.

(f) A loaded firearm (except as provided in 14 CFR 108.11).

(g) Fireworks that combine an explosive and a detonator.

(h) Fireworks containing yellow or white phosphorus.

(i) A toy torpedo, the maximum outside dimension of which exceeds 23 mm. (0.906 inch), or a toy torpedo containing a mixture of potassium chlorate, black antimony (antimony sulfide), and sulphur, if the weight of the explosive material in the device exceeds 0.26 g (0.01 ounce).

(j) Explosives specifically forbidden in the section 172.101 Table of this subchapter.

(k) Explosives not meeting the acceptance criteria specified in section 173.57 of this subchapter.

(l) An explosive article with its means of initiation or ignition installed, unless approved in accordance with section 173.56.